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ALL ASPECTS OF THE SET OF MULTILATERALLY
AGREED EQUITABLE PRINCIPLES AND RULES FOR
THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES
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DRAFT REPORT OF THE SECOND UNITED NATIONS CONFERENCE TO REVIEW ALL ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

Held at the Palais des Nations, Geneva,
from 26 November to 7 December 1990

Rapporteur: Mr. Walid Mahmoud Abdel-Nasser (Egypt)

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Chapter I

REVIEW OF ALL ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES:

(a) REVIEW OF 10 YEARS OF APPLICATION AND IMPLEMENTATION OF THE SET;

(b) CONSIDERATION OF PROPOSALS FOR THE IMPROVEMENT AND FURTHER DEVELOPMENT OF THE SET, INCLUDING INTERNATIONAL CO-OPERATION IN THE FIELD OF CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(Agenda item 8)

[continued]

43. The representative of Poland stated that since the beginning of 1990 the Polish Government had stabilized the economy and initiated crucial changes in the economic system. These had been based mainly on demonopolization, privatization and liberalization of external trade. She recalled that, under the centrally-planned system, the authorities had set up monopolies and deliberately eliminated small and medium-size enterprises. As a result there were high concentration ratios in almost all fields of economic activity. At the same time, the majority of Polish enterprises were relatively small and weak by international standards, whereas in some branches - for example, in light industry - they were unusually big. Her country was the first post-communist country to set up an Antimonopoly Office as an independent government agency. The Government was in the process of dissolving the existing State monopolies and was trying to foster a competitive open economy. The first task was to split up all multi-plant enterprises which had been set up in the past for the implementation of the central planning system. This process of splitting up was based on the underlying economic criterion of competitive-market effectiveness. However, it had been found that such splitting up was not sufficient for the development of competition. The Government had become convinced that the behaviour of State enterprises could not be changed without privatization, and the process had already started. The Antimonopoly Office was actively involved in ownership changes to ensure that State monopolies were not changed into private ones, with the result that the Antimonopoly Office was not so much absorbed by mergers control as were its counterparts in Western countries. She hoped that Polish

experience in antimonopoly activity was a good basis for co-operation with other post-communist countries. The Antimonopoly Office was ready to organize a seminar for these countries in Warsaw in May 1991.

44. She explained that the antimonopoly law prohibited restrictive agreements, required notification prior to mergers and transfer of ownership, authorizing their prohibition if they threatened competition, and allowed the splitting of dominant enterprises that permanently restricted competition or conditions for its existence. The law enumerated different types of prohibited monopolistic practices. The first group referred to the practices which were considered monopolistic, irrespective of the market power of the undertakings concerned. The second group referred to certain agreements of a cartel type which restrained competition by fixing prices, dividing markets, limiting production and eliminating competitors from the market. These agreements were also illegal irrespective of the market power of the parties. The third group referred to abuses of a dominant position. Dominant position occurred when a firm did not face "substantial competition". The dominance might be indicated by a 30 per cent market share. All these practices were forbidden unless they were justified by the conditions of the economic activity in question, which meant that the "rule of reason" had been included in the law. The fourth group consisted of acts which were unconditionally forbidden if they were practised by monopolists. These acts referred to various aspects of pricing policies.

45. She added that the antimonopoly law was enforced by the Antimonopoly Office, together with its regional branches, which was subordinated to the Council of Ministers. The President of the Office was appointed and recalled by the Prime Minister. Violation of the Law was severely penalized. Both the firms and their managers might be penalized financially. The fines were paid to the State budget. All decisions of the Antimonopoly Office could be appealed against in the Antimonopoly Court within two weeks from receipt of such a decision. Finally, the Polish antimonopoly law and policy were fully consistent with the Set of Principles and Rules.

46. The representative of the Republic of Korea stated that, since adoption of the Set by the General Assembly, a rapidly increasing number of countries had adopted RBP control legislation and the consensus to control RBPs had spread worldwide. In general, international efforts to control RBPs had proved to be reasonably satisfactory. His country had responded immediately after adoption of the Set by introducing the Act for Monopoly Regulation and

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Fair Trade and had started a systematic control of anti-competitive and unfair business conduct. Furthermore, through revision of the Act in 1986 and 1990, measures were introduced to deal with the concentration of economic power, while the organization and administrative power of the Fair Trade Commission had been strengthened. At the same time, the Korean market had been opened up steadily over the past 10 years and government regulations such as business licensing had been abolished in a number of industries. As a result, it was apparent that a healthy climate had been created for private enterprises to pursue fair competition under an open market structure.

47. He added that, owing to changes in the world economic environment, additional efforts needed to be exerted at the international level. Compared to the rapid progress in GATT and other forums which gradually reduced the impact of governmental barriers to trade, international co-operation for the control of RBPs had proved to be insufficient. It was highly important therefore to prepare a more concrete and effective programme of action during this Conference to enhance international co-operation in this area. He underlined in particular the need for increased information and technical assistance.

48. There was also a need to enhance and improve transparency in the area of controlling RBPs. While transparency of governmental barriers to trade had progressed at a more or less satisfactory level, the existing possibilities under the Set to uncover non-governmental practices had not been fully utilized. Many developing countries were anticipating the accelerated opening of their domestic markets as a result of the ongoing Uruguay Round negotiations, and these countries were deeply concerned about the possibility that numerous firms from developed countries would rush into their markets and engage in many unfair business practices. In this regard, his Government endorsed, in principle, the idea that an international scheme should be devised to control RBPs in international transactions more effectively, as a measure to complement the opening of markets in developing countries.

49. He also commented on the proposals which Group B and the Group of 77 had placed before the Conference. Regarding those of Group B, he gave full support to the argument that both multilateral and bilateral technical assistance on RBP control issues should be encouraged. Looking back on his country's experience of introducing RBP legislation and enhancing it, he could see that technical co-operation from international organizations such as UNCTAD and from developed countries had been very useful. During the

past 10 years, the various international meetings on antitrust or RBP control, including the IGE meetings and seminars held by UNCTAD, had provided his country with good advice which had been instrumental in the efficient enforcement and improvement of the fair trade policy in the Republic of Korea. He stressed that his country was more than willing to share with other countries its experience in successfully managing its economic transformation and in administering fair trade policy. In this connection, his country was interested in preparing an appropriate programme for technical co-operation with UNCTAD in 1991. He also supported the idea that improved mechanisms for informal discussions and exchange of views among experts, pursuant to sections C.4 and G.3 of the Set should be developed for future meetings of the Intergovermental Group of Experts. To meet the rising demand for technical assistance, he felt that developed countries were in a better position to provide more help in this regard.

50. He stated that his country fully supported the proposals by the Group of 77. However, the issues should be approached with care to make the Conference a productive one. First, since the Set was in the form of a recommendation and was not legally binding, amendment of the provisions of the Set should receive the consensus of the groups participating in the Conference, which was vital for the effective enforcement of the Set. Secondly, he pointed out that the Set had already created an Intergovernmental Group of Experts and a Review Conference as international bodies for controlling RBPs and had given certain duties to the UNCTAD secretariat in this regard. Top priority, therefore, should be given to the full utilization of those bodies, and the possibility of establishing a special committee should be considered at a later stage.

51. The representative of Kenya, expressing support for the statement made by the spokeman for the Group of 77, said that 10 years after adoption of the Set the incidence of RBPs had actually increased. Moreover, the consensus that had brought success in 1980 had withered away in the subsequent years to the extent that the 1985 Review Conference had ended in a failure. Unfortunately, this negative trend had occurred at a time when many developing countries, engaged in serious efforts to liberalize their economies, needed to check the proliferation of RBPs by enterprises that might take advantage of the situation to capture market shares through unfair means. The attitude of some developed countries, in which some of the very damaging RBPs originated, was a

matter of added concern. This was reflected in their proposals to liberalize trade in services and to establish agreements on trade-related investment measures (TRIMs) and trade-related intellectual property rights (TRIPs) in the context of the Uruguay Round of multilateral trade negotiations. Without prejudging the outcome of the Round, it went without saying that the results in these areas would have an impact on the competitive environment in developing countries and therefore it was very important that the Set, which was the only international instrument that existed for the control of RBPs, be strengthened and made effective.

52. He stated that his country had already taken measures to implement the Set. In 1989, the Kenya Legislation for the Control of RBPs had come into effect. Immediately, his country had sought assistance in the training of officials to enforce the competition law. He expressed appreciation to the German Government who had assisted in training two officials at the Federal Cartel Office. In January 1990, an RBP Seminar had been held in Nairobi thanks to the assistance of the United States, the United Kingdom, the EEC and the Nordic countries. A further two-day Seminar had been held in Nairobi for the officials involved in the enforcement of the Legislation in September 1990, again with assistance from the United States and the United Kingdom in both funding and the provision of resource personnel. The United Kingdom had agreed to train one of his country's officials in London next year. He urged other countries to follow this example and to assist developing countries engaged in liberalizing their economies so that competition could be enhanced in their countries.

53. He described the difficulties which the Competition Authority faced in conducting investigations in cases involving collusive tendering. In the case of mergers and take-overs, the Authority was able to take appropriate decisions. Surveys so far carried out by the Authority had revealed that nearly all RBPs stipulated in section D, paragraphs 3 and 4 of the Set, were being practised by various enterprises operating in the country. The violations were being committed by both multinational corporations and local companies in the areas of both vertical and horizontal restraints. The tactics used made prosecution difficult for lack of evidence.

54. In the short time since the Legislation had been in force, his country had detected all manner of RBPs. The capacity to control RBPs would be enhanced if there were improved transparency and consultations procedures, as

well as information-gathering. In this regard, he supported the views expressed on behalf of the Group of 77 and also drew attention to the suggestion made by the secretariat in its report (TD/RBP/CONF.3/3 and Add.1).

55. He observed that, in the recent past, the trend in transnational corporations had been to merge. This might have some relationship with what was happening in the global market. Trading blocs had been created at the global level and it was possible that the mergers were meant to create larger and more efficient enterprises in order to be able to compete with other large organizations within the trading blocs. Nevertheless, whereas RBPs were prohibited within the various trading blocs, they would almost certainly be practised in the developing countries to the detriment of the process of competition and economic development in those countries. Concerted action by all countries was therefore required in order to curb the use of such RBPs.

56. The representative of Colombia pointed out that when the Set had been adopted 10 years ago, the economies of developing countries, including those of most Latin American countries, had been closed economies, in which State intervention in the allocation of resources had been important. During the decade, the level of protection in these countries had diminished as a larger number of countries adopted open-door policies, and today in Latin America protectionism had become the exception. The liberalization of markets had revealed a series of imperfections that were incompatible with the general principle of competition. As economies were liberalized the Set of Principles and Rules had shown its usefulness, but at the same time its shortcomings had become apparent.

57. In this context, the dismantling of quantitative restrictions in Colombia had led to the adoption of antidumping and countervailing duty statutes, and the beginning of revision of antimonopoly legislation. It should also be noted that, at the level of the Andean Group, the Presidents of the five countries in the Galapagos Declaration of 1989, pointed to the necessity of adopting policies promoting free competition in order to consolidate the Andean economic area. This, inter alia, had led to the revision of decision 230 dealing with restrictive and unfair trade practices at the subregional level. In the preparation and revision of all these rules, the Set had served as an important, but insufficient, reference. For this reason, she strongly supported the statement of the Group of 77. While she agreed that domestic RBP legislation was necessary for the control of such factors, since the Set was only recommendatory such legislation should be complemented

with a multilateral consultations mechanism which would ensure coherence among national competitive policies. It was therefore important to improve transparency and to define clear consultation procedures. Her delegation also supported - and called for greater efforts with respect to - technical assistance and training, and indicated that Colombia was willing to host the seminar on RBPs which, owing to internal circumstances which had now fortunately been overcome, had not been able to take place in 1989. Finally, she expressed her delegation's support for a third Review Conference in 1995.

58. The representative of Sri Lanka stated that legislation on restrictive business practices in his country had been in effect for only three years. Sri Lanka was beset by many economic problems but his Government firmly believed in the open economic policies that had been launched 11 years ago. These policies had been further strengthened by liberalization of freights, by the privatization of State sector organizations and by the introduction of the Industrial Promotion Bill which had been passed by Parliament in October 1990 with the object of creating competitiveness and promoting an export-oriented industry. At times, however, market forces could lead to concentration of market power. There was a need therefore for a legal framework to ensure that market forces would not contrive their own destruction. These objectives were to be achieved through the creation of the Fair Trading Commission of Sri Lanka, which applied the principles laid down in the Set of Principles and Rules. Hence, the Fair Trading Commission had to act with vigilance to identify and control monopolies, mergers and restrictive business practices that would operate against the public interest. While this was a new body, which had been in existence for only three years, he believed that in the coming years its activities would increase greatly.

59. So far the Commission had had the opportunity of investigating three monopoly situations in the supply of products manufactured in Sri Lanka. The firms connected with the supply of these products had market shares exceeding 50 per cent. However, the Sri Lankan legislation did not prohibit monopolies per se, and no evidence had been found to support the charge that these firms had acted against the public interest. Several anti-competitive practices reported to the Commission had also been investigated. In one instance, a service organization having a dominant position in the market had refused to comply with the notice issued under the Act calling for information, and the organization had been prosecuted for non-compliance. The Court decision on the subject was still pending.

60. The Commission also extended the scope of its activities to the field of international trade and would have to work in close collaboration with national government agencies, non-governmental organizations and restrictive business practices authorities in other countries. In this respect, he noted the importance of the results of transparency and consultative procedures. In fact, one of the proposals put forward by Sri Lanka at the ninth session of the Intergovernmental Group of Experts regarding the improvement of the coverage of the Set related to the issue of transparency. The amendment proposed to paragraph 6 of section E of the Set was meant to seek the active support of the Governments of countries in which parent companies of TNCs were located, whenever it was not possible for developing countries to obtain information from TNCs operating within their territory. He stressed the need to establish a public registration system of all RBPs and to make these registers accessible to foreign trade partners. He proposed a system of notification of such information to a centralized world registry.

61. With respect to the consultation procedures as spelt out in the Set, he noted that they had not been used despite repeated requests to take advantage of the facilities provided during the sessions of the Intergovernmental Group of Experts. In his view, unless the developing countries were in a position to detect, investigate and control RBPs adversely affecting their trade and development, the consultation procedures contained in the Set would be of no use to them.

62. With respect to technical assistance, while deeply appreciating the contributions made by donor countries, he invited other developed countries capable of providing funds to follow suit without further delay. He strongly supported the action plan proposed in paragraphs 71 and 72 of the secretariat report on technical assistance (TD/RBP/CONF.3/4). He emphasized that the Group of 77 position could be further strengthened by implementation and application of the Set by the member States.

63. The representative of Romania considered that the Review Conference was of particular significance at a time when sustained efforts were being made to liberalize international trade, to ensure free competition, including in the Eastern European countries now in the process of transition to market economies, and to promote international trade and development, particularly of the developing countries. The growing interdependence among the economies and

their greater compatibility resulting from the process of reforms and structural adjustments created a new basis for implementing the control of restrictive business practices.

64. He shared the view of the spokesman for the Group of 77 and other speakers that the main objectives of the Set had not yet been fully attained. Owing to the persistence of restrictive business practices at micro-economic level adversely affecting international trade, and to the lack of specific legislation at the national level, such practices had an impact, particularly on the economies which were less prepared to cope with international competition under the current economic conditions. Moreover, the mergers and take-overs taking place were limiting competition in the market. Therefore, it was of the utmost importance that the Conference should adopt measures aimed at increasing international commitment on the control of restrictive business practices.

65. He described the application of the Set in his country before and after the dismantling of the State monopoly in the field of foreign trade and in the financial and banking system, to ensure autonomy and free competition among economic agents. His Government was envisaging the privatization of at least 50 per cent of the economy, to be achieved in the next three years. Also, in November 1990, the Government had begun to liberalize prices with a view to decreasing and eliminating State intervention in the economy. All these measures were enlarging the coverage and application of the Set in Romania. The laws adopted up to now, introducing the economic and financial reforms, were incorporating the main provisions of the Set. However, a specific detailed legislation in this field was to be enacted by the Parliament.

66. It was obvious that the efficiency of the Set should be increased. In this respect, the measures proposed by the Group of 77, Group B as well as other member States constituted a constructive basis for conducting further negotiations. Greater transparency as well as a wider exchange of information in the field of restrictive business practices should be ensured. The mechanism of consultations at bilateral and multilateral level should be improved as well. He also thought it would be useful to examine the possibility of setting up a permanent body of UNCTAD to deal with RBPs and of convening the Third Review Conference in 1995.

67. Finally, recalling the opening statement made by the Secretary-General of UNCTAD concerning the significant number of developing countries requesting technical assistance, he underlined the interest of his country in receiving UNCTAD's assistance to formulate legislation on RBPs and to train the personnel for its application. He also hoped to receive assistance from the developed countries and from international organizations, including UNDP.